

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

LANDWORKS CREATIONS, LLC,)	
)	
Plaintiff,)	
)	Civil No.
v.)	05-40072-FDS
)	
UNITED STATES FIDELITY AND)	
GUARANTY COMPANY,)	
)	
Defendant.)	
)	

**MEMORANDUM AND ORDER ON DEFENDANT'S MOTION
FOR LEAVE TO FILE AN AMENDED ANSWER AND COUNTERCLAIM**

SAYLOR, J.

Defendant United States Fidelity and Guaranty Company has moved for leave to file an amended answer and a counterclaim against plaintiff Landworks Creations, LLC. The motion was timely filed under the Court's scheduling order dated January 4, 2006. Plaintiff opposes the motion on the grounds that the proposed amendment would be futile.

Under Fed. R. Civ. P. 15(a), leave to amend "shall be freely given when justice so requires." "In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Plaintiff here claims that the proposed counterclaim would be futile because defendant's factual basis for the claim is "simply not subject to proof," and that it "has no evidence to support

the wild allegations in the proposed amendment.” Plaintiff thus does not argue that the proposed counterclaim fails to state a claim upon which relief can be granted—or even that the proposed amended pleadings contain immaterial, impertinent, or scandalous matter, *see Fed. R. Civ. P.* 12(f)—but simply that defendant will not be able to produce evidence of its claims. Notwithstanding plaintiff’s florid rhetoric as to the purported outrageousness of the counterclaim (e.g., “a falsehood of mind-boggling audacity”), a claimed future inability to produce evidence is not a proper basis for denying a motion to amend. The counterclaim may or may not have merit, but it is not invalid on its face, and therefore not futile.

Accordingly, for the foregoing reasons, United States Fidelity and Guaranty Company’s Motion for Leave to File an Amended Answer and Counterclaim is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: June 7, 2006